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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 319

HENRY R. PICKETT, RICHARD L. KIRBY and HAROLD WIESING,
Petitioners,

vs.

STATE OF MICHIGAN,
Respondent.

BRIEF IN REPLY TO BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN

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REPLY BRIEF OF PETITIONERS ON APPLICATION FOR WRIT OF CERTIORARI

B.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

It appears to us that Respondent on page 10 of its Brief concedes that the petition for Certiorari in this case presents several new and novel questions not previously passed upon by this Court. However, Respondent argues on pages 2 and 3 of its Brief that there are no "Special or important reasons" for granting the writ.

We think it clearly appears that constitutional issues are involved, and the oppression of a single Defendant by officers of the State in a manner contrary to the Anglo-Saxon concept of due process or fair play has been considered grounds for the granting of this Court's writ.

We believe the Petition presents the double problem of whether the combined procedures of the Michigan Inquisitorial law and the synthetic judicially created offense of "conspiracy to violate the gambling law" deprived these

Petitioners of due process, and whether those procedures and interpretations place all the citizens of Michigan in danger of oppression from judge-operated prosecutions and from the ambiguity of the undefined crime of "conspiracy to violate the gambling law".

Revised Rule 19 (A) does not substantially change the criteria suggested by this Court under previous Rule 38, paragraph 5.

The provision concerning a federal question "of substance", not hitherto decided, is thus met in Respondent's Brief only by the implied argument that the questions are not "of substance".

Nearest Respondent comes to an argument is to say that *In Re Oliver,* 333 U. S. 527, "has no application" (Respondent's footnote 2).

As pointed out in *In Re Oliver,* secret or summary proceedings against witnesses for contempt of the 23 man grand jury were unknown.

The majority of the Court, after criticizing the one-man grand jury's actual operation in secret hideouts, etc., as quoted in the Petition, page 11, held that the Petitioner in the *Oliver* case had not challenged the constitutionality of granting inquisitorial power to a judge. Mr. Justice Rutledge, however, (333 U. S. 278-283), held that the system was properly before the Court and should be struck down. He stated:

> "* * * this Court departed from our Constitutional plan (when) it permitted selective departure by the state from the scheme of ordered personal liberty, established by the Bill of Rights. * * * Only by an exercise of this freedom has Michigan been enabled to adopt and apply her scheme as was done in this cause. * * *
>
> "(footnote 9) * * * That aggregate (Bill of Rights) cannot be secured, indeed it may be largely defeated, so long as states are left free to make broadly selective application of its protections."

Mr. Justice Frankfurter, while technically dissenting, held that the case should be remanded to the Michigan Supreme Court for further consideration, citing *Musser vs. Utah,* decided same term, 333 U. S. 95, 68 S. Ct. 397.

In that case, the majority of this Court remanded the case to the Supreme Court of Utah to pass upon the federal questions. One of them was based upon the rule that "Statutes defining crimes may fail of their purpose if they do not provide some reasonable standards of guilt", the issue raised by our questions 5 and 6. While Mr. Justice Frankfurter indicated that a grand jury could be reduced to one judge, Michigan has not claimed this interpretation herein, see text, infra.

We believe the use of the Judge-Grand Juror proceeding, the method used in its performance, use of its records by the prosecution and the denial of the use thereof to the Defendants, all of which we think clearly appear from the petition and records, place this case before the Court in a position where it is demonstrated that the constitutionality of the law, the methods used by the Judge-Grand Juror and the possible abuses of such a system, if continued in the future, present Federal questions of substance not heretofore decided.

We understand that this Court has granted a writ in a companion case involving the Michigan Judge-Juror system. We believe our case is complementary, presenting other aspects of the Judge-Juror Prosecution, including the implied threat of contempt conviction against witnesses, through the use and withholding of the grand jury testimony at the trial.

We submit that our question separately present "special and important reasons", as discussed hereinafter and in the petition.

We submit the second question, "Did these proceedings deprive Petitioners of due process?", is important in view of the arguments of the Attorney General that usurpation of the powers of another branch of government is not unconstitutional unless it violates due process. Also, the methods and actual operation of the Grand Juror, from secret interrogation of witnesses through trial, necessarily, or at least in this case, results in denial of due process by imposing the ideas of the Inquisitors on the witnesses.

The third and fourth question involve Petitioners' opportunity to learn of the actual methods of conducting the grand juror proceeding and the withholding of such knowledge from petitioners and their counsel; and the privilege

of the use of the grand juror testimony by the Prosecuting Attorney in the trial, but to withhold and prevent its use by the Petitioners for any purpose including cross examination of the state's witnesses who had been before the grand juror.

The fifth and sixth questions consider whether the judiciary may create, under the guise of a "common law crime", the felony of "conspiracy to violate the gambling law", which was unknown to the common law, and whose elements are still veiled in mystery.

A "special and important" reason why this doctrine should be reviewed, we submit, is that it gives police officers increased powers to arrest, search homes, places of business or automobiles for evidence of gambling without warrants; powers dangerous and out of proportion to the (statutory) seriousness of the crime.

The substantive offense of gambling is a high misdemeanor in Michigan.[1]

Between the police and the citizen, the Constitution has imposed an impartial judiciary. When the judges of the highest court, except the Supreme Court of the State, for weeks, months, or even years, themselves, with their personally appointed investigators and special prosecutors operate a police investigation and then sit on examinations and trials in prosecutions instituted by their colleagues, we feel that the Judge-Inquisitors lose their judicial viewpoint. The rights and liberties of the citizens are in grave danger.[2]

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[1]The local prosecutors and police tend to justify arrests and searches upon the ground that "there is reason to believe that a felony has been committed." From all that can be learned from the decisions of the Michigan Supreme Court, any gambling by two or more persons can be called a felony. This results from an interpretation of the law based on, although not fully supported by, the decisions in *People vs. Bommarito*, 309 Mich. 139, and *People v. Ormsby*, 310 Mich. 291 (in which cases, however, the officers were admitted peaceably and personally observed gambling. Cert. denied).

[2]Judge Arthur T. Vanderbilt, in his lecture at the University of Nebraska, in the Roscoe Pound Lectureship Series, April 16, 1952, The University of Nebraska Press, Chapter 3, decries the judiciary either accepting or being required to accept functions not judicial in nature. At Page 116, he cites *In re. Richardson*, 247 N. Y. 401, 160 N. E. 655, with approval, saying:

> "Similarly, a New York statute casting on a justice of its Supreme Court the mandatory duty of investigating charges against a public official and reporting the evidence with his findings and conclusions to the governor was held unconstitutional."

When the State Supreme Court Justices are called upon to review the guilt of persons, under a law of conspiracy, which they themselves have created or discovered, it is difficult for Defendants successfully to argue that the elements of the crime, as defined by law, have not been established.

D.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

2. Sections of the code of Criminal Procedure quoted in the appendix are *not* followed in full in "One Man Grand Jury" cases. Specifically, all examinations under grand juror proceedings are held before Circuit Judges (or Recorders' Judges, who comprise a Criminal Court for the City of Detroit of equal dignity to the Circuit Court) to whom the "one man grand juries" are now limited (#28.943 *M. S. A. Supp'l,* page 48a of Petition). Other examinations are heard by Municipal Judges or Justices of the Peace. In the case at bar, the Judge-Grand Juror himself took the arraignments and accepted pleas from some Defendants (1).[3]

Thus the continuity between the investigating judge and the later stages of the "one man grand jury" prosecution, and his personal impact upon Defendants and witnesses was established.

(Footnote 2 continued)—

At Pages 117, 118, and 119, Judge Vanderbilt discusses the 1947 Senate Committee on the Judiciary Report, listing instances where Federal judges were employed on missions not judicial and he states:

> "The committee report in condemning the practice lists five undesirable results which may flow from the use of judges on executive missions:
>
> (1) Reward may be conferred or expected in the form of elevation to a higher judicial post.
> (2) The judicial and executive functions may be improperly merged.
> (3) The absence of the judge from his regular duties increases the work load of the other judges of the court, if any, and may result in an impairment of judicial efficiency in the disposition of cases.
> (4) Nonjudicial activities may produce dissention or criticism and may be destructive of the prestige and respect of the federal judiciary.
> (5) A judge, upon resumption of his regular duties, may be called upon to justify or defend his activities under an executive commission."

3Unless otherwise plainly indicated, numbers in parentheses refer to pages of the record printed for use of the Michigan Supreme Court, and filed in this Court pursuant to Revised Rule 21 (4).

The 1827 statute enumerated offenses well known to the common law, but Respondent is unable to answer our authority that the offense of "conspiracy to violate the gambling law" was unknown to the common law and has never been defined so that a citizen may know what conduct is prohibited.

E.

CONCISE STATEMENT OF THE CASE

1. The argument that defendants failed to take the stand is highly improper.

2. The effect of asking the judge whether the witnesses testified differently on the trial would be, as Petition stated, just to determine whether, in his opinion, they differed. Witnesses admitted that they might have differed; and recalling them for several "grand jury" sessions, we think, is almost conclusive evidence that they had. However, as a protagonist of the Prosecution and in charge of the investigation, would not the Judge-Juror probably have testified in such a way as to justify his investigation? When the judge-juror at the trial testifies as to his opinion concerning the sameness of the testimony, is he not invading the province of the trial jury?

3. While Respondent argues that the elderly business man was "convinced", according to the truth, we contend that he was "convinced" by the pressure of the Judge-Juror, Special Prosecutor and Investigator. The result is that the grand jury imposes its ideas upon the citizen with such impact that the witnesses become, unknowingly, instruments of the thoughts of the Grand Jury staff.

The same special Prosecutor was present at the trial and at the "one man grand jury" investigation. *Thus the impact of the grand juror proceedings continued from the investigation through the trial.* We think it appeared in Arney's fear of testifying.

The Respondent's statement that the witnesses testified freely and voluntarily is only a conclusion. It overlooks the fact that the witnesses were subjected to the Judge-Juror and the Special Prosecutor, the day before the examination, in the County Jail (106-109, 113).

On the trial, Arney did not testify freely and voluntarily or even otherwise.

F.

ISSUES RAISED IN STATE COURT

1. Counsel for Petitioners specifically stated that the grand jury testimony "might or might not be used by them on the trial" (63) which could only mean for impeachment or contradiction; and later asked to read the testimony for "possible impeachment" ~~(247)~~. (251).

2. This point in Respondent's brief is discussed under E (2) above.

G.

REPLY TO ARGUMENTS OPPOSING CERTIORARI

Again we urge that Respondent's brief does not meet any of the points raised in our argument, but seeks only to minimize their importance, and hence, to minimize the importance of the rights of citizens accused of crime and the danger to civil liberties of combining the investigative with the judicial function.

Questions 1 and 2. Respondent says that witnesses were not interrogated in a cell which, of course, would be too small. However, they were taken into the part of the jail reserved for prisoners with the door locked behind them by the turnkey (140), and bars on the windows.

Whether witnesses were questioned to the point of exhaustion is not yet known, but it is known that Arney's wife testified and, after she came out, Arney went into the hotel room and testified in the matter desired by the Grand juror functionaries (220, ~~231~~). 221

As to the footnotes (5) through (6a) of Respondent's brief, we say that in some respects, the Michigan Supreme Court has been astute to prevent invasion of one branch of government by another, as where a Circuit Judge was not permitted to appoint an arbitrator in a labor dispute, *Local Union 170 vs. Circuit Judge,* 322 Mich. 332. However, the Michigan Court has taken the opposite view as to judges acting as police investigators, or legislators, as presented by the instant case.

We also argue that, in a criminal case, for the Prosecution to be joined with the judiciary deprives Defendants

of Due Process, particularly under circumstances as aggravated as here. The Judge-Inquisitor appointed his own special prosecutor and the special prosecutor also largely controlled the preliminary examination and trial, making the Prosecution branch of the case practically conducted by the Judge-Juror and his personal appointee.

The cases cited in Respondent's brief footnote 6, present entirely different conditions,[4] all of which have been highly controversial to establish the rule claimed.

(a) *Proceeding not justified as a grand jury or otherwise.*

We can find no opinion of the Michigan Supreme Court stating whether or not the "one man grand juror" was a true "grand jury" or a police or preliminary investigation.

Apparently the Respondent argues that it is *not* a grand jury, because its returns (except when used as basis for proceedings for removal of public officers)[5] require a preliminary examination, by a Circuit Judge, before trial. This argument was used in the Michigan Supreme Court and here; because otherwise the "grand jury" proceedings could not have been sustained.

But, if it be conceded that it is *not* a grand jury, it must be a mere investigative staff,[6] and the alleged reasons for secrecy of testimony before it, peculiar to grand juries, fall. The Defendant should be entitled to develop the methods of interrogating witnesses as though

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[4]*Dryer vs. Illinois*, 187 U. S. 71, 84, involved the indeterminate sentence and the parole board. The judge sets the minimum penalty, and the statute, the maximum with the right of the prisoner to be freed before the maximum term under the supervision of the Parole Board. Since the legislature could have set the maximum as the minimum, since the prisoner remains under the control of the Board as though by enlargement of jail limits, the prisoner does not lose any right entrusted to the judiciary. The Governor retains the right to absolute pardon. However, this type of law in Michigan has caused much friction between the Judges and the Parole Board.

Crowell vs. Benson, 285 U. S. 22, and *Highland Farms Dairy vs. Agnew*, 300 U. S. 608; The two remaining cases, uphold the right of the Legislature to set up quasi-judicial or quasi-legislative bodies (workmen's compensation and milk control). In recent years, this practice has been upheld with misgivings. The viewpoint of the American Bar and Congress, we believe, is that parties' rights should be protected by an appeal to the Courts. Michigan takes the opposite view, that separation of powers prevents review by the Courts, *O'Dell vs. Flint Civil Service Commission*, 328 Mich. 631.

[5]Cf. *In re Richardson*, 247 N. Y. 401, 160 N. E. 655.

[6]The Supreme Court of Michigan called it a "judicial investigation", second line of opinion herein, Petition, page 21a.

done by any other police officers. If it is a mere police investigation, a Judge should not conduct it.

On the other hand, if this investigation be considered a grand jury, it was conducted in a highly improper manner, as argued in the Petition, pages 12-14.

(b) The Attorney General cannot, and should not, say that the testimony was the truth. We claim that witnesses were subject to such intimidation that no one knows whether their testimony represented the truth, as they originally saw it, or the truth as conceived by the "one man grand jury" team, and imposed upon the minds of the witnesses.

It was not necessary that the Prosecutors consider witnesses' testimony as hostile, except that of Arney on the trial, whom they refused to treat as hostile, but instead excused and relied upon his previous "voluntary" testimony.

Questions 3 and 4. We have discussed the procedures involved, previously herein, and the constitutional right of due process and production of testimony under subpoena duces tecum in Defendants' behalf, in our Petition.

Reading *Gordon vs. U. S.*, 344 U. S. 414, discloses that a "fishing expedition" meant into *all* papers in government's possession, not specific testimony, pointed out by counsel, as a result of the testimony of People's own witnesses.

Questions 5 and 6. Neither the Michigan Supreme Court nor counsel has enlightened us as to the elements of "conspiracy to violate the gambling law", and the citizen has no way of knowing what conduct is prohibited thereby.

The history of the judicial crime of "conspiracy to violate the gambling law" is not as clear as indicated by Respondent. The three early cases cited involve the original concept of a civil or a criminal conspiracy to injure some *person.*[7] The concept of "conspiracy to violate" a given

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[7]*People vs. Richards*, 1 Mich. 217, involved a conspiracy to defraud. Dictum, when a felony was committed, the conspiracy was merged; a doctrine forgotten as to felonies or high misdemeanors.

Alderman vs. People, 4 Mich. 414, was also a conspiracy to defraud. Conviction was reversed.

People vs. Saunders, 25 Mich. 119, was charged as a conspiracy to violate the liquor law, but was actually a conspiracy to extort money from an individual.

law, is entirely different, with different results, e.g. to raise a misdemeanor to a felony.

The Michigan Supreme Court did not discover this type of common law conspiracy until *People vs. Tenerowicz*, 266 Mich. 276, in 1934. As pointed out by Respondent, it was discovered and applied to punish corruption of public officials as "conspiracy to obstruct justice" and, later, simply as "conspiracy to violate" a named law, which law was unknown to the common law.

The apparent success of the conspiracy law in punishing corruption of officials has led the Michigan Courts to overlook its inherent dangers, when applied to ordinary citizens charged with violating laws, which are only malum prohibitum.

Likewise, the apparent success of the Inquisitorial Law, in discovering corruption of public officials (together with general ignorance of the investigative methods employed in secret) has kept the law on the books despite criticism, which has resulted in numerous legislative changes designed — unsuccessfully we think — to avoid its danger to the liberty of citizens.

Question 7. The Michigan Supreme Court thought, in the *Pickett* opinion (Petition, page 28a), that the Constitutional question as to confrontation was serious. The Michigan court interpreted the statute by interpreting the language in Mr. Gillespie's book. But the constitutional question remains, that confrontation includes confrontation in front of the trial jury. We urge that (if the witnesses can be produced, at least), the Prosecution must take its chances on the witnesses' hostile testimony or refusal to testify as in *Pleau vs. State*, 225 Wis. 362. The fact that the witness will not repeat his testimony in front of a jury, after the pressure of the grand juror has been removed, or because he is uncertain whether he had testified truthfully before the grand juror or the examining magistrate, is an important circumstance which should inure to the benefit of the Defendant and not to the Prosecution.

APPENDIX

See discussion under D (2), above.

SUMMARY

The freedom of the citizen, unknown in many parts of this world, depends upon a free and independent judiciary; in other words, on the judges. We can think of no greater threat to judicial freedom and impartiality than that the judge make himself part of a team conducting ordinary police investigations and then be expected to act as an impartial judge on the trial of similar cases.

In this case we also have a second danger. That the Appellate Judges create or "discover" a law, without defining its elements, and then proceed to pass on appeal upon the guilt of persons who have been charged with violating it.

Thirdly, the practice of the Judge-Grand Juror inquisition to garner the testimony of all witnesses and to reexamine witnesses and to place the whole thereof in the hands of the prosecution for the trial and conviction of an unfortunate defendant charged with an offense, without being required to disclose in a public trial, open to all citizens and the press, the full context of the testimony before the Grand Juror and the methods employed in procuring the testimony; thereby suppressing from the defendant and his counsel and the jury any process or item contained therein that might be helpful in a defense of the case and a full disclosure of all facts involved, operate to deprive defendants of due process.

We therefore respectfully submit that the case at bar presents special and important reasons for granting the writ of certiorari and that Federal questions of substance are involved.

WHEREFORE, the Petitioners pray that a Writ of Certiorari issue in accordance with the petition heretofore filed.

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